Supreme Court, U.S.
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No. 02-333

In the

Supreme Court of the United States

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICES, BOISE, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware corporation; TCI COMMUNICATIONS, INC., a Delaware corporation; TELE-COMMUNICATIONS, INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,

Petitioners,

v.

PATRICIA A. COLE, CATHY LEAL, and BECKI TRUEBLOOD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY PETITIONERS

With respect to Title VII of the Civil Rights Act of 1964:

1. Did the Ninth Circuit correctly hold that plaintiffs who worked in a deferral state (Idaho), and who knowingly instructed the Equal Employment Opportunity Commission to submit their sex discrimination charges in another state to a local agency which lacked authority to grant or seek the relief sought (City of Seattle Office of Civil Rights), had "filed" their charges with the EEOC within the meaning of 42 U.S.C. Section 2000e-5(c)?

With respect to parallel provisions of the Age Discrimination in Employment Act:

2. Did the Ninth Circuit correctly hold that a plaintiff who worked in a deferral state, and who knowingly instructed the Equal Employment Opportunity Commission to submit her age discrimination charges in another state to a local agency which lacked authority to grant or seek the relief sought, had exhausted her administrative remedies under 29 U.S. C. Section 633(b)?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

In addition to the information provided by Petitioner, Respondents understanding of both TCI Media Services, Great Northwest Region and TCI Media Services, Boise, is that they were dba's of United Cable Television Corporation. Service of process for TCI Media Services, Boise, was served on Bruce Wetten, who was authorized to accept service. Service for TCI Media Services, Great Northwest Region was served, by consent, on defense counsel, with a waiver of service.

Defendant Tele-Communications, Inc., also known as "TCI," incorporated in Delaware, merged into another corporation named AT&T Broadband, LLC, on April 18, 2000, per a check of Corporations on Westlaw.

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Petitioners,

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PATRICIA A. COLE, CATHY LEAL, and BECKI TRUEBLOOD,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents herein respectfully oppose the Petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, which reversed, in part, the entry of summary judgment in Petitioners' favor by the United States District Court for the District of Idaho.

STATEMENT OF THE CASE

A. Facts Material To The Questions Presented.

1. While Respondents Were Employed in Idaho and Resigned There, The Discriminatory Acts Charged Were Perpetrated and Ratified by Petitioners and Their Agent Managers in Both Idaho and Seattle, Washington.

Respondents Patricia A. Cole, Cathy Leal and Becki Trueblood, worked for TCI Media Services in Boise, Idaho, as account executives selling commercial time to local businesses for TCI Cable. Petitioner Edward Moore was also an account executive, and Petitioner Bruce Wetten, was Respondents' and Moore's direct supervisor. (Petitioner's App. at 8a) Bruce Wetten's immediate supervisor, Penny Taylor, a Regional Vice President, worked at the TCI Media Services, Great Northwest Region office located in Seattle, Washington. (Respondents' App. at 2a, 4a, 11a and 13a.)

During the course of respondents' employment with TCI Media Services, each were pervasively harassed on the basis of gender (and additionally, age, as to Cole), and subjected to a hostile work environment by Wetten and Moore. (Respondents' App. at 1a - 4a, 6a, 10a, 11a.) The abusive and harassing sexual conduct of Moore were reported to Wetten, and reports of the discriminatory and sexually harassing/demeaning behavior of both Wetten and Moore were made to Kerin Brasch,

Regional Sales Manager and Regional Vice President, Penny Taylor (Wetten's supervisor), based at the TCI Western Regional office in Seattle. (Respondents' App. at 13a.) Wetten did not inform Taylor of the improper misconduct of Moore, as was required by TCI's Policy. When Petitioner Leal reported the improper and discriminatory conduct of Moore and Wetton to Taylor and to Brasch, who reported it to Taylor, no action was taken in response to respondents' complaints in spite of TCI Seattle management's notice of the illegal and egregious misconduct. (Respondents' App. at 2a, 4a, 11a, and 14a.) Finding the work environment unbearably hostile, all three respondents left the employ of TCI Media Services.

2. Respondents Filed With Both The EEOC and State/Local Agencies As Required To Bring Their Federal Causes of Action In District Court.

After Respondents left TCI Media Services, they each perfected their administrative claims to the EEOC in compliance with Title VII requirements.

Respondent Patricia Cole perfected her administrative claim of discrimination in both Idaho and Washington. She first submitted a charge of sexual discrimination, related to conduct by Wetten and Moore, to the EEOC and the Idaho State Human Rights Commission on a form dated November 15, 1997, setting forth discriminatory practices of Wetten and Moore. (Respondents' App. at 5a, 6a, and 7a.)

Pursuant to a worksharing agreement, the Charge was forwarded to the Idaho State Human Rights Commission and Cole was informed that the charge was to be initially investigated by the EEOC. (Respondents' App. at 8a, 9a.) Cole filed an amended claim with the EEOC adding an additional claim of age discrimination and further identifying discriminatory actions by the supervisory staff at the TCI Regional Office located in Seattle, Washington, and requested that the local Seattle agency be assigned this case. (Respondents' App. at 10a, 10b; and Petitioners' App. at 35a and 36a.) The claim was filed as a new Charge, given a different number and referred to the Seattle Office of Civil Rights.. (Petitioners' App. at 29a, 39a, and 40a.)

Respondent Cathy Leal filed her charge with the EEOC in the State of Washington describing discriminatory conduct in both in Boise, Idaho and in Seattle, Washington. Leal's charge was received by the EEOC on October 15, 1997. (Respondents' App. at 1a, 2a, 17a and 18a). Due to the worksharing agreement between the State of Washington and the EEOC, Leal's claim was co-filed with the local agency in Seattle that had the authority to resolve the matter, (here the Seattle Office of Civil Rights), as Penny Taylor, based at the TCI Great West Regional office was Wetten's immediate supervisor and had the power to stop the discriminatory conditions occurring at Boise, Idaho).

Likewise, Becki Trueblood filed her

charge with the EEOC in Seattle, Washington on October 15, 1997, also describing discriminatory conduct in both Idaho and Seattle, Washington. (Respondents' App. at 3a, 4a, 15a, and 16a.) That claim was also co- filed with the Seattle Office for Civil Rights.

All Respondents were issued right to sue letters and timely brought suit.

3. Respondents Sought Redress In A Proper Venue For Exhausting Their Administrative Claims.

In each of the initial charges sent by Respondents to the EEOC in Seattle, allegations were made, inter alia, against the supervisory personnel of TCI Media Services, located at TCI's Great Western Regional Office in Seattle, Washington. In opposition to Petitioners' Fact 24, and confirmed in Respondents' Additional Facts 50 and 51, it is clear that some of the charged discriminatory conduct had occurred in Seattle by the inaction and reckless indifference of Penny Taylor, Wetten's direct supervisor. (Respondents' App. at 12a, 13a and 14a.)

The EEOC was the designated Federal agency for both Idaho and Washington to initially investigate Title VII and ADEA violations. Regardless of where filed, Idaho or Washington, the EEOC would have been the agency to initially evaluate the claims. (See Petitioners' App. at 44a, 45a, and 46a.) The EEOC, knowing the charges of both Leal and Trueblood involved claims of discrimination in

both Seattle, Washington and in Boise, Idaho, and knowing Respondents lived in Boise, selected from its published list of local Fair Employment Practice Agencies, the Seattle Office of Civil Rights, as the appropriate State agency.[1] (Respondents' App. at 15a-17a and 18a.) Cole's charge of discrimination as to age and actions of Seattle management came later. She asked for the same agency that was assigned to Leal and Trueblood, and her claim was also properly filed in Seattle.

The Seattle Office of Civil Rights had jurisdiction over Respondents' claims. It had the power to investigate and authority to grant or seek relief from TCI's managers in Seattle who had immediate control over Petitioners pertaining to reports of violations of its policies and practices concerning to sexual harassment and gender and age discrimination. It had the power to investigate how Seattle based Penny Taylor, direct supervisor of Petitioner Wetten, personally responded to the claims she received about Wetten's and Moore's misconduct. The Company policies against discrimination that were at issue were not just applicable to TCI employees in the State of Idaho.

Respondents did not dispute that plaintiffs lived and worked in Idaho and the acts of discrimination by Wetten and Moore were done in Idaho [Fact No. 1 of Petitioners' Motion for Summary Judgment], the concluding

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[1] The list of local Fair Employment Practice Agencies also includes the Idaho State Human Rights Commission. (See, Petitioners' App. at 46a.)

line of that Fact only pertained to discrimination by Wetten and Moore, as defined by the context of the Fact. However, there was substantive evidence before the district court and the Ninth Circuit including the initial charges by each of the Respondents, (Petitioners' App. at 13a and 14a, Respondents' App. at 1a-4a, 10a and 11a) that showed that discriminatory actions were perpetuated and ratified by the Regional office management at TCI Media Services, located in Seattle, Washington.

4. Petitioners' Allegation that Respondents Instructed the EEOC To Forward Their Charges To A Local Agency With No Subject Matter Jurisdiction Is A Misstatement Of Fact As Is The Assertion That Respondents Failed to Allege Discriminatory Conduct In Their Administrative Charges.

To support Petitioners' assertion that Respondents knowingly had the EEOC send their charges to a local agency that had no authority to act, they, at Page 7 of the Petition, claim, as fact, that each of the Respondents drafted the forms shown at Appendix G-I, of the Petition. The assertion is false and a misstatement of fact.

The documents that make up those sections of the Appendix, were the Formal Charges, drafted by the EEOC after receiving Respondents' Initial Charges of Discrimination, to be sent to TCI in Seattle and TCI in Idaho.

(See, Respondents' App. 15a-17a, and 18a; and Petitioners' App. 39a and 40a.) Each of those letters from the EEOC show that the EEOC drafted the Charges and was sending them to the Respondents for signature.

Leal's and Trueblood's letters from the EEOC in said Appendix inform them of the local agency selected by the EEOC for referral, here the Seattle Office of Civil Rights. This evidence refutes and effectively dispenses with Petitioners assertions that it was respondents who directed the referral.

The EEOC obtained the information from the Respondent's initial charges, which show that Respondents lived in Boise, Idaho, and that discriminatory conduct occurred in both Boise, Idaho and Seattle, Washington. Nowhere on the form is there an allegation that Respondents worked in Seattle, Washington. The initial charges submitted to the EEOC shows Respondents working for Wetten, who was based in Boise, Idaho. To claim or imply that Respondents intentionally drafted a document (which they did not do), to show their primary employment as being in Seattle, in an alleged scheme to in essence "pull the wool over the eyes of the EEOC" is specious, at best, and, in reality, not supported by the evidence.

Moreover, Petitioners' claim that Respondents did not allege any discriminatory conduct in their EEOC charges is misleading. In the initial charging documents of Leal and Trueblood, which were not attached to the Petition but are attached hereto as

Respondents' Appendix 1a-4a, Respondents provided a description of examples of the improper and egregious misconduct by both Wetten and Moore in Boise, Idaho, and by the supervisory personnel in Seattle, Washington. Respondent Cole's amended charge also reflects discriminatory conduct of Seattle TCI management. (Petitioners' App. at 37a and 38a.)

Petitioners' claim, at Petition, pg. 7, fn 4, that Cole asked the EEOC to forward her ADEA charges to the local agency in Seattle, knowing that Idaho was the appropriate agency, is argument and not fact. When Cole amended the claim originally brought in Idaho, to assert age discrimination and discrimination by Seattle personnel, she requested that the same Washington local office handle her amended claim, as was handling Leal and Trueblood's claims.

B. Procedural History

Following the exhaustion of Respondents' administrative remedies, Respondents filed their complaint in the United States District Court for the Western District of Washington, on May 8, 1998. The case was voluntarily moved to the District Court in Boise, Idaho, by stipulation between the parties, without any finding or any admission concerning venue. Respondents further amended their complaint on November 2, 1998, retaining most of the causes of action of the original complaint. Causes of action for Title VII violations, ADEA (as to Cole only), Equal Pay, and various state

actions were alleged. The case then proceeded by way of discovery of all parties.

Petitioners filed a motion for summary judgment, on January 28, 2000, requesting dismissal of the case on multiple grounds, including that plaintiffs Leal and Trueblood never filed with a state or local agency with authority to grant or seek relief from such practice. The motion was silent as to the filings by Cole. Petitioners further asserted that all plaintiffs should have been required to allow the local agency the 60 days required to review the matter, using an arbitrary date later shown to be when the EEOC received the formal signed charges back from Respondents. (See Excerpt of Record (ER) 000017-000020). On Reply, Petitioners incorrectly asserted, for the first time, that Cole had not filed with any state agency. (See ER 001364-001367.)

Without hearing or affording oral argument, on May 18, 2000, the District Court for Idaho granted Petitioners' Motion for Summary Judgment as to Respondents' federal law claims based on statute of limitation grounds. The District Court ruled that as the result of an alleged failure to comply with the local administrative filing requirements, Respondents were entitled to only a 180 day period going back from December 16, 1997, in which to show discriminatory acts, instead of the 300 days Respondents maintain that they were entitled. (Petitioner's App. at 7a-16a.)

Recognizing that a manifest error had occurred, based on the ruling and reasoning of

the district court as to the administrative exhaustion of remedies, on May 26, 2000, Respondents requested reconsideration on several grounds (see, Memorandum of Points and Authorities in support of Motion for Reconsideration, Docket No. 96) but on July 19, 2000, the District Court for Idaho denied Respondents' Motion for Reconsideration of the District Court's May 18, 2000, order.

Petitioners timely filed their Notice of Appeal of both the Judgment on the Motion for Summary Judgment and the Order on the district court's ruling on Petitioners' Motion for Reconsideration.

Upon briefing by the parties and oral argument, the Ninth Circuit, reversed most of the judgment, affirming only the judgment on the Equal Pay cause of action, and remanded the case for further proceedings. The Ninth Circuit found that Respondents administrative filings in both Idaho and Washington were proper; all of the plaintiffs were entitled to the 300 day time period; and Respondents were therefore timely with their claims. It further found that the district court's dismissal of Leal's constructive discharge claim because Moore had left months before she quit was incorrect in that the court did not consider that Petitioner Wetten remained as supervisor on the job at the time of Leal's constructive discharge.

Petitioners sought a rehearing, en banc, which was denied, on June 5, 2002.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 sets forth the considerations that govern a granting of review on certiorari which will "be granted only for compelling reasons." Petitioners claim that Rule 10(a) and 10(c) apply in that the Ninth Circuit "decided an important question of federal law that has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court" or "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." (Petition at pg 10.) The Rule further states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

As explained below, Respondents assert that the Ninth Circuit Memorandum, at issue in this request, does not fall within either Supreme Ct. Rule 10(a) or 10(c).

I. THE NINTH CIRCUIT CORRECTLY APPLIED WELL SETTLED FEDERAL LAW IN ITS DE NOVO FINDING THAT RESPONDENTS EXHAUSTED THEIR ADMINISTRATIVE REMEDIES IN THE PROPER FORUM.

Petitioners allege that this case raises an important issue regarding the exhaustion of administrative remedies under Title VII and ADEA that has not been resolved by this Court.

Specifically, they claim that Respondents "forum shopped" when they filed their administrative claims in Washington, and selected a forum "that had no connection to any of the discriminatory conduct they alleged." (Petition at pgs 10 and 11.) The Petitioners go so far as to scoff at the Ninth Circuit's Memorandum by asserting it would have condoned Respondents exhausting their administrative claims in, by example, the State of Virginia. (Petition at pg 12.) To be sure, had Respondents selected (or even would have been allowed to select) Virginia as the local venue, then Petitioners might have had something to complain about. Respondents, however, did no such thing.

A. Respondents' Alleged Discriminatory Conduct by TCI Regional Management, Whose Offices Were In Seattle Washington.

Respondents Leal and Trueblood have always alleged that, in addition to the egregious behavior of Petitioners Wetten and Moore in Boise, Idaho, the supervisory personnel at the Seattle Regional office of TCI Media Services, Greater Northwest Region, also participated in discriminatory behavior, by ratifying Wetten and Moore's illegal behavior by their silent acquiescence, once they had knowledge of the wrongful behavior. (See Respondents' App. at 1a-4a.)[2] Accordingly, the

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[2]. Patti Cole, first filed her initial claim, regarding discriminatory behavior in Idaho only, with the EEOC and the Idaho Human Rights Commission. She later amended her claim to add a charge of age

State of Washington was a proper venue in which to exhaust respondent's administrative remedies and litigate the facts of this case.[3]

Clearly, the Ninth Circuit here did not condone the filing of administrative charges in a local jurisdiction completely unrelated to the discriminatory issues raised and without authority to provide a remedy for the claimant. Nor does its Memorandum hold or stand for the proposition that a complainant can perfect state or local administrative remedies in any location of their choosing without reference to the conduct alleged. The Ninth Circuit reviewed the record de novo, considered the arguments of the parties, including Petitioners' assertion that Respondents had filed state/local charges in the wrong forum, and found that: all Respondents had perfected their administrative remedies; filing in Idaho or Washington was proper; and each was entitled to the 300 day period that the district court denied them. On that basis, it reversed the district court's judgment. Nowhere is it required that an

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discrimination, as well as discrimination against the TCI Media Services management in Seattle, Washington, and asked that the matter be referred to the same local agency that the other plaintiffs, her former co-workers, had earlier been referred to by the EEOC. That request for an amended charge was made a second charge, which was referred to the Seattle Office of Civil Rights. (Petitioners' App. 39a, 39a.)

[3]. Respondents further maintained that Washington was a proper venue in which to bring the suit as they had a good faith belief that their employment records were kept in the Regional office, and they named TCI Media Services, Great Northwest Region, based in Seattle, Washington, as a defendant. (See, Plaintiff's Complaint, Docket No. 4.)

appellate court, in an unpublished Memorandum, cite to each and every point it considered in reaching its determination.

The selection of Washington as a place in which to raise the administrative claims was appropriate, based on the content of the claims.

B. Petitioners' Claim That The Ninth Circuit Impermissibly Expanded The Law Pertaining To Exhaustion Of Administrative Remedies Is Based On Faulty Premises.

Petitioners base their argument solely on their erroneous conclusion that: 1) Respondents intentionally directed the EEOC to send the charges to an agency that could not take any action; 2) the Seattle Office of Civil Rights had no power to investigate charges of discrimination in Seattle, which affected a subordinate in Idaho; and 3) the Ninth Circuit would not have found that objectionable because of its "extraordinarily permissive interpretation of Section 706(c) of Title VII and Section 14(b) of the ADEA. For the reasons set forth herein, none of these suppositions are valid.

1. Petitioners' Allegation That Respondents Intentionally Directed The EEOC To Send Charges To An Agency That Had No Authority To Act Is Factually Incorrect.

The basis for Petitioners Question rests on their assertion that Respondents somehow were able to direct the EEOC to send their

charges to a forum in which the agency would not be able to carry out its tasks, should it have decided to investigate the action. The evidence, however, is contrary to that assertion. The evidence shows that it was the EEOC that selected the local Fair Employment Practice agency for Leal and Trueblood. To argue that Cole's later request, that her amended charges identifying discriminatory conduct in Seattle be referred to the same local entity addressing her former co-workers' similar claims, is evidence that all Respondents engaged in an intentional ploy to have an administrative agency appointed without the power to process the claim is unreasonable and without merit.

Petitioners ignore that part of each plaintiffs' initial charge under oath was an assertion that the TCI Regional office, located in Seattle, Washington, had actively discriminated against each of them by having knowledge of the discrimination occurring in Boise, Idaho, and not taking any action, contrary to the terms of its own policies. Moreover, the Seattle based TCI Media Services, Great Northwest Region was named as a defendant in the complaint.

Petitioners' further assertion that the Idaho State Human Rights Commission was the only agency to have power, fails to acknowledge that the Seattle Office of Civil Rights surely could have approached Wetten's supervisor and raised the issue that Seattle was doing nothing to stop Wetten's discriminatory practices or protect plaintiffs from being

exposed to the discrimination and hostile environment pervasive at the Boise, Idaho office. It clearly had the authority to address discriminatory conduct being propagated by the TCI Media Services, Great Northwest Region management located in Seattle, Washington.

2. Petitioners Use This Forum To Argue For A Restriction Of Established Law.

Petitioners broadly argue that this Court requires strict compliance with the statutory provisions governing exhaustion of administrative remedies under Title VII and the ADEA. They further assert that this Court's recent ruling on the subject, National Railroad Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002) compels a tightening up on the procedural requirements for exhausting administrative remedies. Specifically, they argue that the law should require that claimants follow the literal law of the Title VII, requiring that state or local filing occur first and argue that the sixty day waiting period, and no less, should commence prior to a filing with the EEOC. Such narrow interpretation of the law will, according to Petitioners, prevent Circuits, such as the Ninth, from ignoring the rules.

That the Ninth Circuit found Respondents' administrative filings proper, however, is not at odds with the discussion in National Railroad Passenger Corp. v. Morgan

122 S. Ct. 2061 (2002).[4] That case, rather addressed when conduct outside the 300 day period could be used to show discriminatory conduct in Title VII actions. Although the case reviewed the law in relation to administrative filings, it did not deal with the location in which an administrative claim was to be filed or whether the time limits of 180 versus 300 days applied. It is the alleged lack of jurisdiction of the local agency where the EEOC referred the case, which brings this question to the Court.

The issue asserted here by Petitioners is whether the local agency had the authority to consider the claim. The Ninth Circuit ruled that it did.

3. Existing Law On Exhaustion of Administrative Remedies Was Followed By The Ninth Circuit In This Case.

Ordinarily, discrimination claims under Title VII (and ADEA) must be filed with the EEOC within 180 days of the date on which the allegedly discriminatory practice occurred. 42 U.S.C. Section 2000e-5(e)(1). If, however, the claimant "institutes proceedings" with a state agency that enforces its own discrimination laws – a "deferral" state – then the period for filing claims with the EEOC is extended to 300 days. Id.; see, 29 U.S.C. Section 626 (d)(2).

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[4]. Indeed, in seeking a stay on discovery in this case, Petitioners cited to *National Railroad* as being the new law on which defendants intended to seek a writ of certiorari to the Supreme Court. See, Docket No.124, 125.

Laquaglia v. Rio Hotel & Canino, Inc., 186 F.3d 1172, 1174 (9th Cir. 1999). Washington is a deferral state. Sanchez v. Pacific Powder Co.,147 F.3d 1097 (9th Cir. 1998). Nothing in the Ninth Circuit's Memorandum is contrary to this law.

This Court has clearly recognized the impact of administrative filings in deferral states, such as Washington and Idaho. In Equal Employment Opportunity Commission v. Commercial Office Products Company 486 U.S. 107, 1998), this Court, held that a state agency's decision to waive its exclusive 60 day period for initial processing of a discrimination charge, pursuant to a worksharing agreement with the EEOC, terminates the agency's proceedings within the meaning of section 706(c) of Title VII so that the EEOC immediately may deem the charge filed. The Court further held that a complainant who files a discrimination charge, untimely under state law, is still entitled to the extended 300-day federal filing period of section 706(e) of Title VII.

This Court further has previously denied writs of certiorari on Ninth Circuit cases wherein the court held that it was not necessary to file with the state agency first to be entitled to the 300 day limitation. See, Wilshire v. Standard Oil Co. of California, 652 F.2d 837, 842 (9th Cir. 1981), cert. denied, 455 U.S. 1034 (1982); Bouman v. Block, 940 F.2d 1211, 1220, (9th Cir. 1991), cert. denied, 550 U.S. 1005 (1991). In Bouman, the Ninth Circuit made it clear that it had previously rejected the

argument that the state proceedings must be instituted first to extend the limitation period. "Since the EEOC deferred jurisdiction to the state within 300 days, the extension period is triggered regardless of whether the complaint was first received by the EEOC or the state." Bouman, supra, 940 F.2d at 1220.

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER UNITED STATES COURTS OF APPEALS.

Petitioners claim that the Ninth Circuit's decision conflicts materially with three other Circuit cases, where the "charging parties were responsible for their own failure to exhaust their administrative remedies through an FEP agency with subject matter jurisdiction." (Petition at pg 18.) Petitioners' argument, however, is flawed.

A. Petitioners' Finding Of Conflict Is Flawed.

As noted herein, there was no "at fault" failure to exhaust proper administrative remedies. There was no conspiracy to file in a location, where Respondents knew their administrative remedies could not be satisfied. There was no attempt to "fool" the EEOC into thinking that Respondents worked for the Seattle office. The EEOC is the entity that initially selected the local agency, Seattle Office of Civil Rights, for Leal and Trueblood, on receipt of their initial charges. It further agreed to refer Cole's second (sought to be

amended) claim, dealing with Seattle based discrimination, to the same agency as Leal and Trueblood. In all likelihood, it would have made the same independent choice.

There was nothing "impermissible" in the Ninth Circuit's finding that Respondents' charges were properly filed with the EEOC in Seattle, Washington where one of the responding parties had its place of business, and where some of the discriminatory conduct by TCI Media Services occurred.

Petitioners' claim that the Ninth Circuit ignored the local agency is mere speculation. The Memorandum, at App. 2a to the Petition, states:

> We review the district court's holding that the claims are barred by the Title VII statute of limitations de novo. Santa Maria v. Pacific Bell, 202 F.3d 1170, 1175 (9th Cir. 2000). We find that all three appellants were entitled to the 300 day period. Appellants' filings of charges in Idaho and Washington were proper. See 20 C.F.R. §§ 1601.8 and 1626.5.

B. The Cases Cited By Petitioner As Conflicting Do Not Conflict With The Ninth Circuit Memorandum In This Case.

Cases cited by Petitioners to be contrary to the ruling of the Ninth Circuit, in this case are distinguishable. The two Fourth Circuit

cases involve either an absolute failure to file with a state or local agency, or a failure to take any action, when informed that state filing was erroneously made in another state.

Citicorp Person-To-Person Financial Corp. v. Brazell, 658 F.2d 232 (4th Cir. 1981), involved a plaintiff who informed the EEOC that she had filed state charges, or would file state charges and, in reality, never filed with the state. Plaintiff was clearly aware of the filing requirement with the state agency but did not for reasons, unexplained, file. Under those circumstances, she was not entitled to the 300 day period, and consequently was untimely with her complaint.

No allegation exists in Citicorp, as there was in this case before both the district court and the appellate court, that the local agency filing was in the wrong jurisdiction. In Citicorp, plaintiff simply did not file with the state agency. The legal basis set forth in the Ninth Circuit Memorandum would support the same finding that the Fourth Circuit made in Citicorp. Plaintiff in that case would also be found to be untimely with her claim by the Ninth Circuit legal analysis.

In Cornett v. AVCO Financial Services, One, Inc., 792 F.2d 447 (4th Cir 1986), the EEOC sent plaintiff's ADEA claim to California, AVCO's home office, instead of West Virginia, where plaintiff worked, based on the possibility of multi-state discrimination action. The EEOC investigated and the California Fair Employment Practice agency notified plaintiff

that they had received the complaint, and that he could bring suit in California. Instead, plaintiff brought suit in West Virginia, in spite of not asking for the EEOC to send the state charge there. The only issue in the case was whether the district court abused its discretion in not waiving or treating the state claim as tolled so that plaintiff could belatedly commence a proceeding in West Virginia. The appellate court found that the district court did not abuse its discretion to waive the state proceedings based on the filing in California instead of West Virginia because plaintiff, who had known of the California filing, did nothing for five years while defendants brought a motion to dismiss and a summary judgment motion, without taking any affirmative action to correct the problem. Too much time had passed, and it was concluded that plaintiff's inaction that caused the problem.

Like Citicorp, Cornett is also factually distinguishable. The Fourth Circuit decided whether the district court abused its discretion by failing to provide plaintiff a waiver or tolling the federal action until state proceedings could be filed. The appellate court found that because plaintiff knew that the EEOC sent the state claim to California instead of West Virginia for five years and did nothing to correct the matter, his own inaction caused the problem. Cornett did not file in the state where the state charges were perfected. He, instead, filed in another state.

Respondents, here, did bring suit in the State of Washington, where their administrative

claims were perfected. The first entity named in Respondents' complaint was the Washington based company, TCI Media Services, Great Northwest Region, of which Respondents claimed had discriminated against them. The Cornett case does not conflict with the Ninth Circuit Memorandum, as there was no issue of waiver or tolling addressed, nor was there a filing of the action in a venue where administrative remedies had not been perfected.

Likewise, Maynard v. Pneumatic Products Corp., 256 F.3d 1259 (11th Cir. 2001), does not address the issues addressed by the Ninth Circuit. In Maynard, plaintiff was terminated from his assembly line position, while on limited duty from a back injury, because the product his line worked on allegedly was being discontinued. Two hundred and ninety two days later, he for the first time submitted an affidavit to the EEOC claiming a violation of the American with Disabilities Act. Because the record on review with the appellate court contained no information regarding a worksharing agreement between the EEOC and the Florida Commission on Human Relations, the appellate court could not, therefore determine if the state agency had waived its right to a 60 day review within the eight remaining days of the 300 day period. If there was no waiver, the EEOC claim would be untimely.

Petitioners' complaint regarding administrative filings in this case does not deal with the timing of the state or local agency

waiver issue. Petitioners, herein claim that the wrong local agency was used as the local agency. Maynard, therefore deals with an issue unrelated to the instant case and therefore not instructive. Again, nothing in the Ninth Circuit Memorandum addresses this issue and therefore its Memorandum is not in conflict with the Eleventh Circuit.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Kenneth D. Simoncini *
Jose, California 95126
(408) 280-7771

Bradley G. Andrews
Jones, Gledhill, Hess,
Andrews, Fuhrman,
Bradbury & Eiden, P.A.
1097
Boise, Idaho 83701
(208) 331-1170

*Counsel of Record

October 4, 2002

DECLARATION OF CATHY LEAL
IN SUPPORT OF CHARGE OF DISCRIMINATION

I, CATHY LEAL, declare as follows:

1. My name is Cathy Leal.

2. My address and telephone number are as follows: 10655 Conway Avenue, Boise, Idaho, 83709; (208) 377-8456.

3. I am a female.

4. My date of birth is: November 12, 1960.

5. My Social Security Number is: 518-88-7188.

6. The company and individuals against whom this charge is made are: TCI Media Services, Great Northwest Region, located at 18 West Mercer, Suite 100, Seattle, Washington, 98119; Bruce Wetten, General Manager, at the TCI Media Services Boise office, located at 5475 Gage Street, Boise, Idaho, 83706; Edward Moore, former Team Leader at the TCI Media Services Boise office, current address unknown.

7. I am informed and believe that TCI Media Services employs in excess of 500 employees. TCI Media Services is a cable advertising business.

8. While employed at TCI Media Services, I held the position of Account Executive.

9. I am making the following charges: I was harassed, subjected to a hostile work environment forced to quit, constructively terminated, and denied promotion, benefits and equal pay because of my gender/sex.

10. I base these charges on the fact that during my employment with TCI Media Services, I experienced a hostile work environment, and harassing and abusive conduct,

including but not limited to: Moore would kiss me on the back of the neck and/or rub my legs while I was on the phone with clients; Moore would grab me from behind, physically restrain me, and kiss me on the neck or say "You know you want it"; Wetten and Moore referred to the female sales people in the office as "My bitches"; Wetten would call me at the office to tell me about erotic dreams he had about me; Wetten would tell me "Maybe there's a chance for us": Wetten would block my exit from his office in order continue to harass me. Lucrative sales accounts that rightfully belonged to me would be given to male account executives: I was denied a rightful promotion to senior account executive: I was denied a rightful promotion to team leader. Wetten would require meetings with just the two of us at a much higher frequency than he met with other employees and attempt to engage me in discussions about my personal life: regional management, including Penny Taylor and Kerin Brasch sanctioned such behavior and attitudes: TCI Media Services Northwest Region responded to my complaints with comments such as "Boys will be boys".

II. The last date of the above discrimination was October 1, 1997.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 10, 1997, at Boise, Idaho.

CATHY LEAL

DECLARATION OF BECKI TRUEBLOOD
IN SUPPORT OF CHARGE OF DISCRIMINATION

I, BECKI TRUEBLOOD, declare as follows:

1. My name is Becki Trueblood.

2. My address and telephone number are as follows: 3777 Newtown Road, Placerville, California, 95667.

3. I am a female

4. My date of birth is: April 26, 1963.

5. My Social Security Number is: 567-49-7304.

6. The company and individuals against whom this charge is made are: TCI Media Services, Great Northwest Region, located at 18 West Mercer, Suite 100, Seattle, Washington, 98119; and Bruce Wetten, General Manager, at the TCI Media Services Boise office, located at 5475 Gage Street, Boise, Idaho, 83706.

7. I am informed and believe that TCI Media Services employs in excess of 500 employees. TCI Media Services is a cable advertising business.

8. While employed at TCI Media Services, I held the position of Account Executive.

9. I am making the following charges: I was harassed, subjected to a hostile work environment forced to quit, constructively terminated, and denied promotion, benefits and equal pay because of my gender/sex.

10. I base these charges on the fact that during my employment with TCI Media Services, I experienced a hostile work environment, and harassing and abusive conduct, including but not limited to: Wetten referred to the female

sales people in the office as "My bitches"; Wetten would block my exit from his office in order to continue to harass me; Wetten informed me that I did not need to make as much as the men in the office, since I was "just a single woman"; Lucrative sales accounts that rightfully belonged to me would be given to male account executives; Regional management, including Penny Taylor and Kerin Brasch, sanctioned such behavior and attitudes.

11. The last date of the above discrimination was June 3, 1997.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 14. 1997, at Placerville, California

BECKI TRUEBLOOD

CHARGE OF DISCRIMINATLON
This form is affected by the Privacy Act of 1974;
See Privacy Act Statement before completing this form

AGENCY	CHARGE NUMBER
X EEOC	380980253

Idaho State Human Rights Commission and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)
Ms. Patricia A. Cole

HOME TELEPHONE (Include Area code)
(208) 362-5555

CITY, STATE AND ZIP CODE
4878 Chinook Avenue, Boise. ID 83709

DATE OF BIRTH
01/23/54

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME
Tele-Communications, Inc.

NUMBER OF EMPLOYEES, MEMBERS
Cat A (15-100)

TELEPHONE NUMBER (Include Area Code)
(208) 375-8288

STREET ADDRESS CITY AND ZIP CODE
8400 Westpark, Boise. ID 83709

COUNTY
001

COURSE OF DISCRIMINATION BASED ON
(Check appropriate box(es))
X SEX

DATE DISCRIMINATION TOOK PLACE

EARLIEST	LATEST
07/08/96	04/04/97

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):
I began employment with the above-named respondent as an Account Executive on July 8, 1996. Beginning in my first month of employment, and thereafter, I was subjected in the workplace to foul and sexually explicit language, inappropriate touching, derogatory comments about my gender, and discrimination with reference to sales decisions and promotions.

I complained on numerous occasions to my supervisor about the sexual harassment, gender bias, and pervasive hostile work environment. My complaints were never addressed, and the problems never resolved. On April 4, 1997, I felt compelled to resign my position with this respondent in a constructive discharge, In order to escape the ongoing harassment and discrimination.

In all of the above particulars, I believe that respondent discriminated against me because of my gender, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I declare under penalty of perjury that the foregoing is true and correct.

Date 11/15/97

Charging Party (Signature)

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)
11/15/97

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Idaho State Human Rights Commission
1109 Main Street, Suite 400
P0 Box 83720
Boise, ID 83720-0040

DATE 12/19/97
EEOC CHARGE 380980253
FEPA CHARGE

SUBJECT: CHARGE TRANSMITTAL

Cole, Patricia A. v. Tele-Communications, Inc.
(Charging Party) (Respondent)

Transmitted herewith is a charge of employment discrimination initially received by the:
X EEOC on 12/10/97
(Date of Receipt)

X Pursuant to the worksharing agreement, this Charge is to be initially investigated by the EEOC.

Please complete the bottom portion of this form to acknowledge receipt of the charge and, where appropriate, to indicate whether the Agency will initially investigate the charge.

TYPEDNAME OF EEOC OR FEPA DIRECTOR
Jeanette M. Leino

SIGNATURE

Cole, Patricia A. v. Tele-Communications, Inc.
(Charging Party) (Respondent)

TYPED NAME OF EEOC OR FEPA
Marilyn Shuler Director

TO: Equal Employment Opportunity Comm
909 First Avenue, Suite 400
Seattle, WA 98104-1061

EEOC CHARGE 380980253

DECLARATION OF PATRICIA A. COLE
IN SUPPORT OF CHARGE OF DISCRIMINATION

I, PATRICIA A. COLE, declare as follows:

1. My name is Patricia A. Cole.

2. My address and telephone number are as follows: 4878 Chinook Avenue, Boise, ID 83709, (208) 362-5555.

3. I am a female.

4. My date of birth is: 1/23/54.

5. My Social Security Number is: 553-84-6334.

6. The company and individuals against whom this charge is made are: TCI Media Services, Great Northwest Region, located at 18 West Mercer, Suite 100, Seattle, Washington, 98119; Bruce Wetten, General Manager, at the TCI Media Services Boise office, located at 5475 Gage Street, Boise, Idaho, 83706; Edward Moore, former Team Leader at the TCI Media Services Boise office, current address unknown.

7. I am informed and believe that TCI Media Services employs in excess of 500 employees. TCI Media Services is a cable advertising business.

8. While employed at TCI Media Services, I held the position of Account Executive.

9. I was employed at TCI Media Services from July 8, 1996, to April 4, 1997.

10. I am making the following charges: I was harassed, subjected to a hostile work environment forced to quit, constructively terminated, and denied promotion, benefits and equal pay

because of my gender/sex and age.

11. I request that the EEOC also file this charge with the Seattle Office for Civil Rights.

12. I base these charges on the fact that during my employment with TCI Media Services, [experienced a hostile work environment, and harassing and abusive conduct, including but not limited to: Moore would touch me in an inappropriate manner, rubbing my shoulders and chest; Moore would grab mc from behind, physically restrain me, and mock intercourse; Wetten and Moore referred to the female sales people in the office as "My bitches" or "bitches"; Wetten responded to my complaints about Moore by saying that Moore was "harmless": Moore would derogatorily comment on my age: I did not receive compensation comparable to similarly situated males: I was denied a rightful promotion to senior account executive: Lucrative sales accounts that rightfully belonged to me would be given to male account executives: regional management including Penny Taylor and Kerin Brasch, sanctioned such behavior and attitudes.

13. The last date of the above discrimination was April 4, 1997.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

Executed on December 31, 1997, at Boise, Idaho

PATRICIA A. COLE

KENNETH D. SIMONCINI,
MARILYNN J. WINTERS
SIMONCINI & ASSOCIATE
1694 The Alameda
San Jose, California 95126-2219
Telephone: (408) 280-7711
Facsimile: (408) 280-1330

GRANT T. BURGOYNE
MAUK & BURGOYNE
515 So. 6th Street
P 0 Box 1743
Boise, Idaho 9370 1-1743
Telephone: (208) 345-2654
Facsimile: (208) 345-2668

Attorneys for Plaintiffs

Case No. 98-CV-342

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PATRICIA A. COLE, CATHY LEAL, and BECKI TRUEBLOOD,
Plaintiffs,

v.

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICES, BOISE, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware corporation; TCI COMMUNICATIONS INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,
Defendants.

PLAINTIFFS' STATEMENT OF DISPUTED FACTS AND ADDITIONAL MATERIAL FACTS IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

DEFENDANT MATERIAL FACTS

PLAINTIFF'S DISPUTED FACTS AND ADDITIONAL FACTS IN DISPUTE

***

24. None of the three Plaintiffs properly followed TCI's sexual harassment reporting policy as set out in Deposition Exhibits 9 and 11.

24. Disputed. Nancy Poindexter Bales received a complaint from Leal regarding Moore's conduct. (Bales at 31:24-33:24.) Becky Bradburn recalled speaking with LEAL about MOORE's behavior. (Bradburn at 49:2-50:17.) Leal reported the conduct of Moore to Bruce Wetten (Leal at 182:12-183:13; 186:5-13; 190:8-15; Defendants Exhibits 38, 39, 41.);Kerin Brasch, Regional Sales Manager, (Leal at 56:1-60:10;69:1 77:25; 78:6-79:5; 94:18-95:3; 95:4-18.) and tried to report it to Robyn Horowitz and Mark Duke, both with Employee Relations (Leal at 93:1-93:11; 216:2-5; 217:1-23.) Kerin Brasch confirmed that Leal had spoken to her about Moore's inappropriate conduct. (Brasch at 80:18-82:9.) Brasch also reported the matter to Penny Taylor, Wetten's supervisor, who was going to speak with Wetten. (Brasch at 120:2-21.) Cole reported Moore's behaviors to Wetten during the course of her employment at TCI and when she left TCI. (Cole at 18:3-14; 28:7:29:5;.) She did not go over Wetten's head to report Moore's behavior as she had witnessed what happened to another employee who had complained about Moore's behavior. (Cole at 29:12-24.) Trueblood told Wetten that Moore's conduct would get him into trouble some day. Wetten agreed with her and said he had spoken with Moore in that regard. (Trueblood at 121:2-23.)

Leal spoke about Wetten's discriminatory practices regarding women with Penny Taylor, Regional Vice President (Leal at 82:11-25.); with Kerin Brasch (Leal at 69:1-77:25; 241:5-25.)

***

50. WETTEN knew of the inappropriate behavior of MOORE. Wetten at 138:18-139:17; 142:22-143:23; 603:2-605:16.

51. Specifically, WETTEN did not inform either his direct supervisor, Penny Taylor or any one from Human Resources/Employee Relations, as was required by TCI policy. Wetten at 596:8-599:11 Taylor at 137:3-8;137:9-16. Duke at 87:24-89:25; 90:1-12; and 97:7-98:1. Brasch at 124:5-125:6.

Equal Employment Opportunity Commission

Equal Employment Opportunity Comm
909 First Avenue Suite 400
Seattle, WA 94104-1061

Respondent: TCI Media Services, Great N W Reg
Charge No:

October 15, 1997

Ms. Becki Trueblood
C/O Kenneth D. Simoncini, Atty
1694 The Alameda
San Jose, CA 95126-2219

Dear Ms. Trueblood:
This is with reference to your recent telephone call/mail inquiry in which you alleged employment discrimination by the above named respondent. The information you have provided indicates that the matter you complain of may be a violation of one or more of the following laws:

[X] Title VII or the Civil Rights Act of 1964 (Title VII)

[X] The Equal Pay Act (EPA)

The attached EEOC Form 5, Charge of Discrimination, was drafted as a result of the information you provided. To facilitate proper handling of this action by the Commission you should:

[1] Review the enclosed charge form and make corrections.

[2] Sign and date the charge in the bottom left hand block where I have made an "X". The date of your signature on the charge will not affect the jurisdiction date established in your original written complaint to EEOC.

[3] Return the signed charge to this office in the enclosed

postage paid envelope.

Since a charge should be processed within the time limitation imposed by law, I urge you to complete these steps as soon as possible. Please call me at (206) 220-6883 if you have any questions.

The paragraph(s) checked below apply to your case:

[X] You should be aware that the Commission will provide a copy of your charge to the below listed agency in accordance with our procedures. If your charge is processed by that agency, you may be required to swear to or affirm your signature before a notary public or an official of the agency. Agency: Seattle Office for Civil Rights

[X] If your charge is investigated by the above agency, they will investigate and resolve your charge under their statute. Under section 1601.76 of EEOC's regulations, you are entitled to request that EEOC perform a Substantial Weight Review of the agency's final finding. To secure this review, you must request it in writing to this office within 15 days of your receipt of the agency's final finding in your case. Otherwise, we will generally adopt the agency's finding as EEOC's.

Sincerely,
Phillip R. Clower
Intake Supervisor

Equal Employment Opportunity Commission

Equal Employment Opportunity Comm
909 First Avenue Suite 400
Seattle, WA 98104-1061

October 15, 1997

Respondent: TCI Media Services
Charge No.:

Ms. Cathy Leal
C/O Kenneth D. Simoncini, Atty
1694 The Alameda
San Jose, CA 95126-2219

Dear Ms. Leal:

This is with reference to your recent telephone call/mail inquiry in which you alleged employment discrimination by the above named respondent. The information you have provided indicates that the matter you complain of may be a violation of one or more of the following laws:

[X] Title VII of the Civil Rights Act of 1964 (Title VII)

[X] The Equal Pay Act (EPA)

The attached EEOC Form 5. Charge of Discrimination. was drafted as a result of the information you provided. To facilitate proper handling of this action by the Commission you should:

[1] Review the enclosed charge form and make corrections

[2] Sign and date the charge in the bottom left hand block where I have made an "X". The date of your signature on the charge will not affect the jurisdiction date established in your original written complaint to EEOC.

[3] Return the signed charge to this office in the enclosed postage paid envelope.

Since a charge should be processed within the time limitation imposed by law, I urge you to complete these steps as soon as possible. Please call me at (206) 220-6883 if you have any questions.

The paragraph(s) checked below apply to your case:

[X] You should be aware that the Commission will provide a copy of your charge to the below listed agency in accordance with our procedures. If your charge is processed by that agency, you may be required to swear to or affirm your signature before a notary public or an official of the agency. Agency: Seattle Office for Civil Rights

[X] If your charge is investigated by the above agency, they will investigate and resolve your charge under their statute. Under section 1601.76 of EEOC's regulations, you are entitled to request that EEOC perform a Substantial Weight Review of the agency's final finding. To secure this review, you must request it in writing to this office within 15 days of your receipt of the agency's final finding in your case. Otherwise, we will generally adopt the agency's finding as EEOC's.

Sincerely,
Phillip R. Clower
Intake Supervisor